



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:

Applicant for CAC Eligibility

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CAC Case No. 16-01521

Appearances

For Government: Tara R. Karoian, Esq., Department Counsel
For Applicant: *Pro se*

January 18, 2018

Decision

CEFOLA, Richard A., Administrative Judge:

Statement of the Case

On June 1, 2016, the Department of Defense (DoD) issued a Statement of Reasons (SOR) to Applicant detailing eligibility concerns for Common Access Card (CAC) issuance pursuant to Homeland Security Presidential Directive-12 (HSPD-12). DoD was unable to find that it was clearly consistent with the national interest to grant Applicant CAC eligibility. The action is based on the Adjudicative Standards found in DoD Instruction (DoDI) 5200.46, *DoD Investigative and Adjudicative Guidelines for Issuing the Common Access Card (CAC)*, dated September 9, 2014, and made pursuant to the procedures set out in Enclosure 3 of DOD Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive). The concerns raised under the Supplemental Adjudicative Standards of DoDI 5200.46 are: Paragraph 2.a (criminal or dishonest conduct).

Applicant answered the SOR on July 5, 2016 (Answer), with Attachments 1 ~3, and requested a hearing before an administrative judge. The case was assigned to me on December 27, 2016. The Defense Office of Hearings and Appeals (DOHA) issued a notice of hearing on February 6, 2017, scheduling the hearing for February 23, 2017. The hearing was convened via video teleconference, as scheduled. The Government offered Exhibits (GXs) 1 through 4, and they were admitted without objection. Applicant

testified and called a witness to testify on his own behalf. The transcript of the hearing (TR) was received on March 3, 2017. The record was left open until March 24, 2017, for the receipt of additional exhibits. Applicant offered Attachments 5~8 as exhibits, which were admitted without objection. Based on the record evidence and testimony presented in this case, Common Access Card eligibility is granted.

Findings of Fact

Applicant is 33 years old. (GX 1 at page 4.) He is married and has four children. (Attachment 5.)

Criminal or Dishonest Conduct

The SOR alleged, under the Supplemental Adjudicative Standards concerning criminal conduct that Applicant should be disqualified from CAC eligibility because: Applicant was arrested three times, and convicted at least once. This was initially supported by a Record Report from the Federal Bureau of Investigation (FBI), but is not supported by the extensive court documents and witness statements provided by Applicant. After a thorough and careful review of the pleadings and exhibits, I make the following findings of fact:

1.c.¹ In December of 2009, Applicant was arrested for, and subsequently charged with, "Occupant Concealed Carry Weapon Vehicle, and Possession . . . Dangerous Weapon." This was Applicant's first arrest, and there is no evidence of a Previous Felony Conviction, as alleged. (Attachments 5 and 6.) Applicant had a "knife . . . in the center console" of his vehicle, and a firearm under his front passenger seat. (TR at page 25 line 5 to page 46 line 5.)

1.b. As a result of a conviction for these two charges, on October 5, 2010, Applicant turned himself into a Sheriff's Department Office, and was incarcerated overnight. (*Id.*, and Attachment 2.) He was not arrested on this date, as alleged in the SOR.

1.a. In June of 2014, Applicant's son appeared at school with a mark on his face. When asked by school authorities how received the mark on his face, Applicant's son said his father hit him. His son, however, failed to mention that the mark was the result of an accident during Karate training at "Open Spar Night". (TR at page 46 line 6 to page 49 line 25, and Attachment 8.) Nothing further occurred as a result of this accident. (Attachment 1.)

Policies

Every CAC eligibility decision must be a fair and impartial overall commonsense decision based on all available evidence, both favorable and unfavorable. The HSPD-12 credentialing standards are listed in DoDI 5200.46, Enclosure 4, Appendix 1, *Basic*

¹ These allegations will be addressed in chronological order.

Adjudicative Standards, and Appendix 2, *Supplemental Adjudicative Standards*. The overriding factor for all of these eligibility criteria is unacceptable risk. The decision must be arrived at by applying the standard that the grant of CAC eligibility is clearly consistent with the national interest.

The objective of the CAC credentialing process is the fair-minded commonsense assessment of a person's life to make an affirmative determination that the person is an acceptable risk to have CAC eligibility. Each case must be judged on its own merits, taking into consideration all relevant circumstances, and applying sound judgment, mature thinking, and careful analysis.

Under Directive ¶ E3.1.14, the Government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the applicant is responsible for presenting "witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel." The applicant has the ultimate burden of persuasion to obtain CAC eligibility.

Factors to be applied consistently to all information available include: (1) the nature and seriousness of the conduct; (2) the circumstances surrounding the conduct; (3) the recency and frequency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) contributing external conditions; and (6) the absence or presence of efforts towards rehabilitation. (DoDI 5200.46, Enclosure 4, paragraph 1.) In all adjudications, the protection of the national interest is the paramount consideration. Therefore, any doubt concerning personnel being considered for CAC eligibility should be resolved in favor of the national interest.

Analysis

Supplemental Adjudicative Standards, Paragraph 2.a

DoDI 5200.46, Enclosure 4, Appendix 2, *Supplemental Adjudicative Standards*, expresses concerns pertaining to criminal or dishonest conduct. Paragraph 2 of this section states:

A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk.

- a. An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about his or her reliability or trustworthiness and may put people, property, or information systems at risk. An individual's past criminal or dishonest conduct may put people, property, or information systems at risk.

The disqualifying conditions set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.b that are raised by Appellant's criminal conduct are:

- (1) A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. A person's convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government's physical assets and to employees' personal property on a U.S. Government facility; and
- (2) Charges or admissions of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted.

Applicant was convicted of weapon-related offenses in 2009. The above disqualifying conditions apply.

Potentially mitigating conditions are set forth in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c. The conditions that could apply to mitigate the security concerns raised by the evidence in this case are:

- (1) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur;
- (2) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence; and
- (4) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

Applicant admitted the one criminal incident that occurred seven years prior to his hearing, for which he spent one day in jail. Applicant has met his burden to establish mitigation under the conditions in DoDI 5200.46, Enclosure 4, Appendix 2, Subparagraph 2.c.

Further Mitigation

DODI 5200.46, Enclosure 4, *CAC Adjudicative Procedures*, Paragraph 1, *Guidance For Applying Credentialing Standards During Adjudication* provides the following:

- a. As established in Reference (g) [HSPD-12], credentialing adjudication considers whether or not an individual is eligible for long-term access to federally controlled facilities and/or information systems. The ultimate

determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI [personal security investigation] must be made after consideration of applicable credentialing standards in Reference (c) [U.S. Office of Personal Management Memorandum, "Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD-12," July 31 2008.]

b. Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(1) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(2) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property or information systems.

(3) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(4) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(5) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(6) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(a) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(b) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

Applicant presented evidence of good character through the statements of his former attorney, his wife, and his Site Manager. (Attachments 5 and 8.) I find that he has demonstrated that he has the requisite judgment to have CAC eligibility. Applicant's request for CAC eligibility should be granted.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

SOR Paragraph 1: FOR APPLICANT

Subparagraphs 1.a~1.c: For Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant CAC eligibility. CAC eligibility is granted.

Richard A. Cefola
Administrative Judge